STATE OF MICHIGAN

COURT OF APPEALS

TARA BONDS, Plaintiff-Appellee,	UNPUBLISHED April 22, 2010
v	No. 290779 Kalamazoo Circuit Court
LAUREL HEALTH CARE COMPANY OF GALESBURG, Defendant-Appellant.	LC No. 08-000095-CZ

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant Laurel Health Care Company of Galesburg appeals by leave granted the trial court's February 13, 2009, order denying its motion for summary disposition of plaintiff Tara Bonds' wrongful discharge claim. We reverse and remand.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant hired plaintiff, an LPN, to work at its nursing home facility in January 2006. According to plaintiff, her employment was terminated in September 2006, when she refused an instruction to put medication in an unmarked container and give it to a resident to self-administer on a leave of absence from the facility. Plaintiff claims that what she was instructed to do was unlawful and that the termination of her employment violated public policy.

The basic facts underlying the termination of plaintiff's employment are undisputed. P.W., a resident and cancer patient at the facility, routinely took pain medication, specifically Dilaudid, for severe pain. P.W. was scheduled for an out-of-town medical appointment on the morning of September 6, 2006. At the shift change on the night of September 5, Jennifer Love, the RN plaintiff replaced at the shift change, informed plaintiff of P.W.'s appointment. Love instructed plaintiff to prepare one dose of Dilaudid for P.W. to take with her out of the facility. According to plaintiff, Love told her to put the medication in a plastic baggie or envelope and give it to P.W. before she left for the appointment. Love mentioned that she (Love) should have obtained a doctor's order for sending the medication with the patient. Plaintiff testified that she refused Love's instruction because she believed that it was against the law to put medication in an unmarked container and dispense it to a patient. Love told plaintiff that Beth Jackson, the director of nursing, had given the instruction, and that plaintiff should ask Jackson or Crystal Green, a unit manager, about the matter.

That evening, plaintiff telephoned Green and expressed her concerns about P.W.'s medication. Green informed plaintiff that what she was being asked to do was permissible under defendant's policy, which provides, in part: "With a physician's order, the appropriate number of medication dosages may be sent with a resident going on pass or therapeutic leave." Plaintiff testified that she did not recall Green ever instructing her to get a doctor's order but even if she did, it did not matter because "[a] doctor has no authority to make me a pharmacist" and defendant's policies do not supersede federal drug law. When plaintiff stated that she was still very uncomfortable sending P.W.'s medication with her in an unmarked baggie or envelope, Green told her to have Patricia Wright, the nurse who would replace plaintiff in the morning, give P.W. the medication.

According to plaintiff, on the morning of September 6, Wright also refused to repackage the medication and give it to P.W. to take with her. At the time, Wright was concerned it would be illegal for her to do so. Plaintiff telephoned Green and reiterated that such actions were illegal. According to Green, she again instructed plaintiff to obtain an order from P.W.'s doctor. Plaintiff testified that she did not recall the instruction. Thereafter, Jackson telephoned the facility and spoke to Wright and plaintiff. Jackson explained that with a doctor's order, giving a patient medication to take at a later time was administering medication, not dispensing it, and that it complied with defendant's policy and federal law. Jackson testified that she believed a doctor's order had already been obtained and instructed plaintiff to give the medication to P.W. When plaintiff again refused, Jackson spoke to Julie Spyker, an RN on duty, who put the medication in a container and gave it to P.W.'s son, who was taking P.W. to the appointment.

On September 7, Jackson learned that no one ever obtained a doctor's order for P.W.'s self-administration of her medication. Jackson spoke to P.W.'s doctor and obtained an order after-the-fact. On September 14, Cheryl Smith, the facility administrator, terminated plaintiff's employment for her refusal to secure a doctor's order for sending the medication with P.W. as instructed.

Thereafter, plaintiff filed allegations of wrongdoing against Jackson and Smith with the state Department of Community Health, Bureau of Health Professions. In June 2007, the Department closed its investigation against Jackson, finding that "a violation of the Public Health Code [could not] be established," and that defendant's policy for self-administration of medication clearly outlined the appropriate procedure for "med administration" to a patient on a leave of absence for an appointment. Later, in an "Expert Review written report," the Department addressed the question whether Smith was "negligent in her delegation/supervision of employees . . . when one of the employees placed one tablet of Dilaudid in a Ziploc bag for a resident trip with her son to the University of Michigan Hospital for evaluation?" The Department concluded that Smith was not negligent and that defendant's policy was not illegal.

Plaintiff filed her complaint in the trial court in February 2008, alleging that she was instructed to violate state and federal law and that when she refused the instruction, her employment was terminated in violation of public policy. Defendant then moved for summary

disposition under MCR 2.116(C)(10).[1] Defendant argued that plaintiff could not establish her wrongful discharge claim because she was not asked to commit an unlawful act. Defendant argued that the legality of its policy was a legal question for the court to decide and that its policy complied with Mich Admin Code R 325.20903(6).

In its opinion delivered from the bench, the trial court stated that defendant's policy did, in fact, comport with the language of R 325.20903(6). But it continued: "The Court, however, is concerned that the actual practice may not, in fact, comport with the policy of Laurel Health Care Company." It concluded:

> There are questions, therefore, raised by the Court in the Court's mind as to whether the implementation of this policy has been done in a way that supports the—the spirit of that particular regulation.
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> [T]he combination of questions the Court has with regard to the actual practice in pursuit of the policy of the Laurels, as well as the question at least raised by Plaintiff of potential disparate treatment, even though the Court quite honestly believes that that's weak, does militate towards the Court's denying the motion for summary disposition at this time . . . .

Defendant applied for leave to appeal the trial court's order denying its motion for summary disposition, and this Court granted the application. *Bonds v Laurel Health Care Co of Galesburg*, unpublished order of the Court of Appeals, entered June 5, 2009 (Docket No. 290779).

II. ANALYSIS

On appeal, defendant argues that the trial court erred in denying its motion for summary disposition of plaintiff's wrongful discharge claim under MCR 2.116(C)(10). We agree.

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[1] Plaintiff also alleged that because she had to work through her lunch hour on a regular basis, as well as other overtime hours, defendant owed her approximately $1,500 in overtime pay. Defendant moved for summary disposition of plaintiff's claim under MCR 2.116(C)(4), arguing that if her wrongful discharge claim was dismissed, her overtime claim would fall below the circuit court's jurisdictional limit. At the hearing on defendant's motion, the trial court stated that there was no evidence plaintiff's requests for overtime pay contributed to her discharge. The court further stated that her overtime claim was "something that this Plaintiff could have addressed through Department of Labor and other administrative means" and there was nothing in the record indicating that she did that. But the court did not specifically rule on the claim. The court's February 13, 2009, order simply stated that defendant's motion for summary disposition was denied. In its brief on appeal, defendant states that its motion for summary disposition of plaintiff's overtime claim under MCR 2.116(C)(4) "is not currently before this Court."

We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we must consider all the admissible evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120; MCR 2.116(G)(6). Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden*, 461 Mich at 120. The interpretation and application of a statute involve questions of law that we review de novo on appeal. *Lincoln v Gen Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000).

There is no dispute that plaintiff was an at-will employee. Her "employment was terminable at any time and for any-or no-reason, unless that termination was contrary to public policy." *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 572-573; 753 NW2d 265 (2008), citing *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982). "'Public policy' proscribing termination of at-will employment is" frequently used in situations involving "an employee's 'failure or refusal to violate a law in the course of employment.'" *Kimmelman*, 278 Mich App at 573, quoting *Suchodolski*, 412 Mich at 695-696.

Plaintiff was discharged for her refusal to follow an instruction to put medication in an unmarked baggie or envelope, give it to a patient for the patient's later self-administration off-site, and obtain a doctor's order for the self-administration before giving the medication to the patient. Plaintiff claims that the instruction required a violation of federal and state law prohibiting nurses from dispensing and repackaging medication in unmarked containers, and therefore, that her discharge was contrary to public policy.

Defendant's policy regarding self-administration of medication is contained in its HealthCare Pharmacy Policies & Procedures Manual. The policy states: "With a physician's order, the appropriate number of medication dosages may be sent with a resident going on pass or therapeutic leave. The name of the medication, strength, and number of doses sent must be documented in the resident's medical record and accounted for upon his/her return." According to defendant, its policy complies with R 325.20903(6), which states: "Self-administration of medication by a patient shall not be permitted, except when special circumstances exist and when supported by a physician's written order and justification." See also MCL 333.2233(1) (permitting the state Department of Public Health to promulgate rules necessary and appropriate to implement and carry out its duties and functions). Rule 325.20903 addresses the administration of medication in nursing homes and nursing care facilities. Additionally, 42 CFR § 483.60 provides that long term care facilities "must provide routine and emergency drugs and biologicals to its residents" and "may permit unlicensed personnel to administer drugs if State law permits, but only under the general supervision of a licensed nurse."

At the hearing on defendant's motion for summary disposition, the trial court agreed with defendant, stating that its policy comported with the language of R 325.20903(6). The court expressed concern, however, that defendant's implementation of its policy did not comport with the law or did not support "the spirit" of the law. On appeal, plaintiff explicitly states that "defendant's policy itself is not illegal." Plaintiff further states that she "has no quarrel with the fact that a doctor could order that a resident take a narcotic medication with her on a leave of absence away from the facility for self administration, as long as the resident self administered

medication that came from a labeled container with proper instructions from a pharmacist." Rather, plaintiff argues that her supervisors' instruction required her to violate the law because neither federal nor state law permits her to repackage medication in unmarked containers and provide it to a patient for self-administration on a leave of absence from the facility.

In so arguing, plaintiff cites several federal and state laws and regulations, all of which are inapplicable here. Plaintiff first cites 21 USC § 825(a),[2] which is part of Chapter 13 (drug abuse prevention and control) of Title 21 (food and drugs) of the United States Code, and states that it is "unlawful to distribute a controlled substance in a commercial container unless such container . . . bears a label . . . containing an identifying symbol for such substance . . . ." 21 USC § 802 defines the term "distribute" for purposes of Chapter 13 as: "to deliver (other than by administering or dispensing) a controlled substance or a listed chemical." 21 USC § 802(11). The term "administer" is defined as "the direct application of a controlled substance to the body of a patient or research subject by . . . a practitioner . . . or . . . the patient or research subject at the direction and in the presence of the practitioner." 21 USC § 802(2). The term "'dispense' means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery." 21 USC § 802(10). Plaintiff provides no rationale for concluding that her supervisors' instruction required her to distribute a controlled substance in a commercial container as contemplated by 21 USC § 825(a). 21 USC § 825(a) does not govern the dispensing of a controlled substance, which specifically includes the packaging and labeling necessary to prepare the substance for delivery by a practitioner or pursuant to the lawful order of a practitioner. See 21 USC § 802(10) and (11).

Plaintiff next cites MCL 333.7302, part of Article 7 (controlled substances) of the Public Health Code, MCL 333.1101 *et seq*. MCL 333.7302 governs the labeling of controlled substances by manufacturers and distributors. It states:

> (1) Controlled substances manufactured or distributed in this state shall have affixed upon each package and container in which the substances are contained, a label showing in legible English the name and address of the principal manufacturer or the distributor, and the name, quantity, kind, and form of controlled substance contained in the package or container.
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> (2) A person, except a practitioner for the lawful purpose of dispensing controlled substances under this article, shall not alter, deface, or remove a label affixed as required in subsection (1).

For purposes of Article 7, the term "manufacture" includes "the packaging or repackaging of the substance or labeling or relabeling of its container," but does not include the "preparation, compounding packaging, or labeling of a controlled substance" by a "practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of his or

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[2] Plaintiff mistakenly cites 29 USC § 825 in her brief on appeal.

her professional practice." MCL 333.7106(2)(b)(*i*). The term "distribute" is defined as: "to deliver other than by administering or dispensing a controlled substance." MCL 333.7105(5). Again, plaintiff provides no rationale for concluding that she was instructed to manufacture or distribute a controlled substance as contemplated by MCL 333.7302. Although manufacturing a controlled substance includes "the packaging or repackaging of the substance or labeling or relabeling of its container," as highlighted by plaintiff, there is a specific exception for packaging and labeling incident to the administering and dispensing of the substance. See MCL 333.7106(2)(b)(*i*).

Additionally, plaintiff cites Mich Admin Code R 338.486(6), which states:

> A pharmacy shall ensure that every medication dispensed is identified with its name and strength labeled on the container in which it is dispensed or on each single unit package. A pharmacy that is engaged in drug distribution to medical institutions which use unit-of-use packaging shall place identification on the label of its package to allow the package to be readily traced. The name of the patient and any identifying number shall be labeled on the medication container. The container may be the individual patients' assigned medication drawer. The directions for use shall be on the label of the container if the directions are not communicated in another effective manner. If the medication is to be self-administered, then directions for use shall be on the container. The preceding provisions of this subrule are minimum labeling standards only and do not supersede other applicable laws or rules.

Although R 338.486(6) requires that all medication dispensed be properly labeled, plaintiff fails to recognize that the regulation applies only to pharmacies. The regulation falls under the section of the administrative code governing pharmacies.

On the other hand, R 325.20903(6), the regulation relied on by defendant regarding the self-administration of medication, falls under the section of the administrative code governing pharmaceutical services provided in nursing homes and nursing care facilities. Plaintiff cites Mich Admin Code R 325.20902, which falls under the same section of the code and states, in part:

> A legend drug shall not be dispensed except by a pharmacist according to established pharmacy policies and procedures. It shall be contained in properly labeled individual containers, kept in a locked cabinet, and shall be accessible only to the nurse in charge. Labeling and relabeling of all drugs shall only be done by a pharmacist. [R 325.20902(1).]

Plaintiff is correct that under R 325.20902(1), only a pharmacist is permitted to dispense and label medication. The administrative code does not define the term "dispense." Plaintiff asserts that dispensing medication includes placing a patient's medication in a baggie or envelope for the patient to self-administer. But considering that R 325.20903(6) permits the self-administration of medication by a nursing home resident when special circumstances exist and with a doctor's order, we conclude that R 325.20902(1) does not prohibit a nurse from placing medication prescribed to a patient in a container and giving it to the patient for self-administration pursuant to R 325.20903(6). Under those circumstances, the nurse is merely

assisting in the patient's self-administration of medication, not dispensing medication as contemplated by R 325.20902(1).

It is also noteworthy that after investigating defendant's policy regarding self-administration of medication and plaintiff's allegations regarding the instruction given her by her supervisors, the Department of Health determined that there was no violation of the Public Health Code. In an "Expert Review written report," the Department cited 42 CFR § 483.60 and R 325.20903(6), and then concluded:

> Tara Bonds was correct in that law states she cannot repackage pharmaceuticals. Tara Bonds is also correct in the law states she may not dispense medication; however, the law specifically states special circumstances supported by a physician's order and physician's justification would allow self administration. [The law] allows for the facility's policy.

Plaintiff asserts that this report constitutes inadmissible hearsay because defendant failed to "verify" it with "an affidavit from some person indicating that it is what it purports to be." But as noted by defendant, plaintiff never sought to exclude the report or questioned its authenticity in the trial court and actually attached it as an exhibit to her brief in opposition to defendant's motion for summary disposition. Moreover, under MRE 803(8), "Records, reports, statements, or data compilations . . . of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law" are not excluded by the hearsay rule. In this case, the Department prepared the report in connection with its duty under MCL 333.16231 to investigate alleged violations of law. Plaintiff further asserts that the Department was not directly presented with the question whether placing medication in an unmarked container for a patient's self-administration is legal. This assertion is without merit. In her letter to the Department, plaintiff stated that she was instructed to "place medication in an unlabeled container, a plastic sandwich bag, and give it to a patient to take later after leaving the building." In its report, the Department answered the question whether Smith was negligent when "one of the employees placed one tablet of Dilaudid in a Ziploc bag for a resident['s] trip with her son . . . ?" An administrative agency's findings of fact are entitled to deference by a reviewing court. *In re Complaint of Rovas*, 482 Mich 90, 101; 754 NW2d 259 (2008). An agency's interpretation of a statute "is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons." *Id*. at 108.

Based on the applicable state and federal law and the Department of Health's determination in this matter, we conclude that defendant's instruction to plaintiff to place a patient's medication in an unmarked container for the patient to self-administer on a leave of absence from the facility did not require plaintiff to violate the law. Defendant's policy regarding self-administration of medication and the particular instruction given to plaintiff comported with R 325.20903(6) and 42 CFR § 483.60. Furthermore, the only factual dispute identified by plaintiff regarding the instruction is whether she was instructed to obtain a doctor's order for the self-administration. But plaintiff testified at least twice, and reiterates on appeal, that whether she was so instructed is immaterial, as she would not have followed an instruction that she believed required her to break the law. Because there is no material factual dispute in this case and because plaintiff was not instructed to violate the law, her wrongful discharge claim must fail. See *Kimmelman*, 278 Mich App at 572-573. Defendant was entitled to summary disposition of plaintiff's wrongful discharge claim under MCR 2.116(C)(10).

We reverse the trial court's order denying defendant's motion for summary disposition. We remand for entry of an order awarding defendant summary disposition of plaintiff's wrongful discharge claim under MCR 2.116(C)(10), and for the trial court to reconsider defendant's motion for summary disposition of plaintiff's overtime claim under MCR 2.116(C)(4). We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering